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IN THE

Supreme Court of the United States

VERIZON MARYLAND, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,

Respondents.

UNITED STATES OF AMERICA

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. THE 1996 ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST STATE COMMISSIONS FOR REVIEW OF THEIR DECISIONS INTERPRETING AND ENFORCING INTERCONNECTION AGREEMENTS 6

II. FEDERAL DISTRICT COURTS LACK JURISDICTION UNDER 28 U.S.C. § 1331 TO REVIEW STATE COMMISSION ORDERS INTERPRETING OR ENFORCING INTERCONNECTION AGREEMENTS 18

A. Verizon's Appeal Is Not Within a Federal District Court's Original Jurisdiction 19

B. Review of the MPSC's Order Is Not A "Civil Action" Under 28 U.S.C. § 1331 25

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval, 532 U.S., __, 121 S. Ct. 1511(2001).....5, 9

BellSouth Corp. v. FCC, 144 F.3d 58 (D.C. Cir. 1998).....16

Cahnmann v. Sprint Corp., 133 F.3d 484 (7th Cir. 1998).....17

California v. Sierra Club, 451 U.S. 287 (1981).....9

Chicago, R.I. & P. Co. v. Stude, 346 U.S. 574 (1954).....20

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997).....*passim*

Cort v. Ash, 422 U.S. 66 (1975).....8, 9

Hameetman v. City of Chicago, 776 F.2d 636 (7th Cir. 1985).....4, 19

Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961).....20

Illinois Bell Tel. Co. v. WorldCom Tech., Inc., 179 F.3d 566 (7th Cir. 1999), *amended*, 1999 U.S. App. LEXIS 20635 (Aug. 19, 1999), *cert. granted sub nom Mathias v. WorldCom Tech.*, 121 S. Ct. 1224 (2000.....6

International College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996), *rev'd on other grounds*, 522 U.S. 156 (1997) .. 24, 25, 26, 27, 28

International College of Surgeons v. City of Chicago, Nos. 91 C 1587, 91 C 5564 (cons.), 1992 WL 6729, at *2-3 (N.D. Ill. Jan. 10, 1992).....22

Jackson Transit Auth.v. Local Div. 1285, *Amalgamated Transit Union*, 457 U.S. 15 (1982).....13, 17, 18

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).....5

Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256 (1985).....22, 23

Lynx v. LaPorte Superior Court No. 2, 789 F.2d 554 (7th Cir. 1986).....23

Mackay v. Pfeil, 827 F.2d 540 (9th Cir. 1987).....24

Mathias v. WorldCom Technologies, Inc., No. 00-878.....1, 6, 7, 15, 24

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).....12, 13

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981).....5

Office of Peoples Counsel v. Maryland Public Service Comm'n, 733 A.2d 996 (Md. 1999).....26

SBC Communications Inc. v. FCC, 138 F.3d 410 (D.C. Cir. 1998).....16

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).....22, 23

Touche Ross & Co. v. Redington, 442 U.S. 577 (1979).....10

Trapp v Goetz, 373 F.2d 380 (10th Cir. 1966).....27

Statutes

28 U.S.C. § 1331.....*passim*

28 U.S.C. § 1367(a).....28

28 U.S.C. § 1441 23
47 U.S.C. § 152 (b) 16
47 U.S.C. § 153 (4) 16
47 U.S.C. § 203 16
47 U.S.C. § 251 .....*passim*
47 U.S.C. § 251 (b) 6, 11, 13
47 U.S.C. § 251 (c).....6, 11, 13
47 U.S.C. § 251 (c) (1).....11
47 U.S.C. § 252 .....*passim*
47 U.S.C. § 252 (a)(1).....11, 12, 13
47 U.S.C. § 252 (a)(2).....7
47 U.S.C. § 252 (b)(1).....7
47 U.S.C. § 252 (e)(1).....7, 14
47 U.S.C. § 252 (e)(3).....14
47 U.S.C. § 252 (e)(6).....*passim*
47 U.S.C. § 252 (f).....17
47 U.S.C. § 252 (f)(1).....17
47 U.S.C. § 252 (f)(5).....11
47 U.S.C. § 271 15
220 ILCS § 5/10-201.....26, 27
220 ILCS § 5/10-201(d). 27
Md. Code Ann., Pub. Util. Co., § 3-203 (2001).....24, 25, 26
Md. Code Ann., Pub. Util. Co., § 3-208 (2001).....26
Md. Code Ann., Pub. Util. Co., § 3-206 (b) (2001) 26

Other Authorities

Illinois Bell Telephone Company Tariff No. 20, Part 19 (available at http://www.sbc.com/PublicAffairs/PublicPoliy/Tariffs2/1,3950,281,00.html?pid=260) 16

Michigan Bell Telephone Co., Tariff No. 20, Part 19 (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html?pid=282) 16

SBC Tariffs (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html) 16

Bell Atlantic SGAT filed in Maryland (available at http:/www.bellatlantic.com/tariffs_info/intra/ef ftar/md/sgat/index.htm) 17

INTEREST OF THE AMICUS CURIAE

The State of Illinois has a strong interest in the manner in which the regulation of local telephone service is conducted, both generally and in this case. The members of the Illinois Commerce Commission, the agency of the state of Illinois that is charged with the task of public utility regulation, are the Petitioners in the case to be argued in tandem with the instant case, *Mathias v. WorldCom Technologies, Inc.*, No. 00-878. The question presented in this case involves an alternative argument for federal district court jurisdiction to review state commission decisions to that put forth by the Respondents in *Mathias* based on 47 U.S.C. § 252(e)(6). The commissioners, and therefore the State of Illinois, seek to assist in persuading this Court not to find such jurisdiction by that alternate route in this case.

Aside from that specific interest, the State of Illinois, through the Illinois Commerce Commission, has been an active regulator of local telephone service for decades. It has long sought to regulate that form of commerce in accordance with state law and in harmony with federal laws and regulations. The State of Illinois believes that the Telecommunications Act of 1996 sets forth an allocation of responsibilities between federal and state institutions that, while no doubt different from that which preceded it, continues to maintain a balance between state and federal interests. The State of Illinois believes that the 1996 Act was designed to continue federal respect for state sovereignty, and is strongly interested in ensuring that 28 U.S.C. § 1331 is construed in a way th :t promotes that legislative design.

SUMMARY OF THE ARGUMENT

In this case, Petitioner Verizon seeks federal district court review of an order by the Maryland Public Service Commission, a state agency. Neither § 252(e)(6) of the Telecommunications Act of 1996 nor 28 U.S.C. § 1331, the general federal question statute, confers subject matter jurisdiction on federal district courts to hear appeals from state commission orders interpreting or enforcing interconnection agreements. In fact, Verizon's appeal is a routine appeal of the Maryland commission's order that is reviewed exclusively by Maryland courts.

Under Article III, Congress has sole responsibility for determining the jurisdiction of the lower federal courts. Congress also determines when private parties are to be given causes of action under legislation it adopts. When Congress intends not to create a private right of action, federal court must respect that decision and not assume the legislative function of creating one, lest they risk enlarging their jurisdiction. The Federal Judiciary, as one of three co-equal branches of the Federal Government, must be vigilant to ensure against such encroachment, which reflects a consideration for separation of powers principles. And when the Federal Judiciary is called upon to determine whether Congress intended to create a private right of action against the States, that request also implicates substantial federalism principles and the Court must be especially attentive to the States' status as sovereigns. Here, Petitioners ask the Court to relax its vigilance and find a private right of action where none exists. In fact, Petitioners argue not only for a private cause of action under the Telecommunications Act of 1996, where Congress intended none, but also for a private right of action against the States. Neither argument is well-founded.

1. Sections 251 and 252 of the 1996 Act do not create private rights of action. Section 251 imposes obligations on incumbent local telephone exchange carriers such as Petitioner Verizon to new entrants such as MCI WorldCom. Those obligations may be implemented through interconnection agreements reached under § 252's negotiation and arbitration procedures or reached without regard to the standards set forth in § 251. Either way, federal law creates the duty to enter into agreements and allocates to the contracting parties, in the first instance, the responsibility to negotiate the terms and conditions of their agreements. Leaving the details of the agreement to the contracting parties, Congress intended that traditional state law contract principles would govern their relationship, and, correspondingly, that state law would provide the remedy for violation of the agreement. As a consequence, the 1996 Act does not create private rights of action for breaches of those agreements.

And, more particularly, §§ 251 and 252 do not create private rights of action against *state commissions* for review of their orders interpreting or enforcing agreements. Congress carefully tailored a limited federal remedial scheme that permits federal review of state commission determinations involving the approval or rejection of an agreement, and even then the review is limited to determining whether the agreement meets the requirements of §§ 251 and 252. *See* 47 U.S.C. § 252(e)(6). In carefully tailoring review under § 252(e)(6) to apply only to state commission determinations approving or rejecting agreements, Congress intended to preclude alternative means of federal review. The review under § 252(e)(6) does not include federal district court review of state commission orders deciding disputes over the meaning of the terms in those agreements. Rather, Congress left supervision of the performance of the agreements to the

States, adjudication of disputes to state commissions, and subsequent judicial review to state courts. To allow carriers to obtain review of state commission decisions interpreting or enforcing agreements under § 1331, when Congress intended for those decisions to be reviewed by state courts, would cast aside the statutory scheme and render superfluous the limited statutory review provided under § 252(e)(6).

2. Besides the lack of private rights of action under §§ 251 and 252, Verizon's complaint seeks appellate review of the Maryland commission's order that is not within a federal district court's original jurisdiction under § 1331. Although Verizon styles its action as a complaint for declaratory relief, it merely seeks review and correction of the Maryland commission's order. "Federal courts have no general appellate authority over state courts or state agencies." *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985). The claims Verizon considers to be federal claims were raised, litigated, and decided at the Maryland commission. Verizon alleges no federal claims separate and distinct from defenses it raised and the Maryland commission decided. Therefore, its claims are bound by the administrative record before the Maryland commission and, accordingly, its complaint for review is not with a federal district court's original jurisdiction.

In addition, Verizon's complaint seeking judicial review of the Maryland commission's order is not a "civil action" within the meaning of § 1331. Maryland courts exercise a special statutory jurisdiction that provides for a deferential review of the Maryland commission's findings and conclusions. As a consequence, Verizon's complaint for review is one for appellate review of the Maryland commission's order and not a "civil action" as required by § 1331. The review Verizon seeks here is a continuation of the administrative

proceedings before the Maryland Commission and, therefore, does not come within § 1331.

ARGUMENT

Under the federal Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Alexander v. Sandoval, 532 U.S. 275, __, 121 S. Ct. 1511, 1519-20 (2001) (internal citations and quotation marks omitted). It is to be presumed that a cause lies outside this limited jurisdiction, and the burden rests upon the party asserting jurisdiction to establish the contrary. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

I. THE 1996 ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST STATE COMMISSIONS FOR REVIEW OF THEIR DECISIONS INTERPRETING AND ENFORCING INTERCONNECTION AGREEMENTS.

The briefs filed by Petitioners in this case begin their analysis of the question presented in the middle. Petitioners assume that federal law creates a private right of action for breach of interconnection agreements, and then proceed to argue in favor of jurisdiction in the federal courts to review decisions of state commissions considering such claims. Because federal law creates no such right, the Court need not consider whether the federal district courts have jurisdiction under 28 U.S.C. § 1331 to afford Petitioners a remedy for its violation.

Sections 251 and 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("1996 Act") do not create independent, private rights of action upon which to base federal court subject matter jurisdiction. Section 251 establishes *obligations* of incumbent local exchange carriers ("LECs") such as Verizon to new entrants such as MCI WorldCom, and those *obligations* may be implemented through interconnection agreements reached under § 252's negotiation and arbitration procedures. Or, an incumbent LEC and a new entrant may negotiate and enter into an agreement without regard to the standards in §§ 251(b) and (c). In either case, "[t]he Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out." *Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999), *amended*, 1999 U.S. App. LEXIS 20635 (Aug. 19, 1999), *cert. granted sub nom.*

Mathias v. WorldCom Tech., 121 S. Ct. 1224 (2000). Thus, federal law creates the duty to enter into agreements, and Congress left it to the contracting parties, in the first instance, to settle on the particular terms and conditions of their agreement.

Congress, however, did not create a federal private right of action for breach of agreements in the 1996 Act. Leaving the details of agreements to the parties, Congress intended that traditional state law contract principles govern their ensuing relationships. Quite naturally, Congress intended that state law would provide the remedy for violation of the agreements. The right of carriers to seek redress for violations regarding the performance of their agreements arises under state law. Simply put, the 1996 Act does not create a private right of action for injuries resulting from the parties' performance under their agreements.

Likewise, and particularly relevant here, nothing in the 1996 Act gives private parties a direct cause of action against state commissions for review of their orders regarding the performance of agreements. As explained more fully in the Brief of Petitioners in *Mathias v. WorldCom Technologies, Inc.*, No 00-878, at pp. 16-26, Congress in the 1996 Act carefully crafted a limited federal remedial scheme for review of state commission determinations made under § 252—that is, state commission determinations involving the formation of agreements. A state commission acts "under section 252" when a carrier i) requests mediation (§ 252(a)(2)), ii) petitions for arbitration (§ 252(b)(1)), or iii) submits an agreement for approval (§ 252(e)(1)). The provisions of § 252 are quite specific in their application and do not address obligations of the parties or of the state commissions that go beyond those listed in that section in connection with interconnection agreements. Indeed, even insofar as it pro-

vides for district court review of state commission decisions regarding the formation of agreements, § 252(e)(6) provides for determinations limited to whether the agreement at issue "meets the requirements of" §§ 251 and 252.

The language, structure and purpose of the 1996 Act therefore make unmistakably clear that Congress considered the issue and did not intend to create a private right of action for federal review of state commission decisions interpreting or enforcing agreements. In carefully tailoring review under § 252(e)(6) to apply only to state commission determinations approving or rejecting agreements, Congress intended to preclude alternative means of federal review. As the Fourth Circuit cogently explained below, "[i]t would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. § 1331 override this effort." Pet. App. 48a. Thus, exercising federal question jurisdiction under § 1331 to allow federal review of state commission orders adjudicating disputes over the performance of agreements would represent an impermissible end-run around that limited framework.

Nor can a private right of action be implied under the 1996 Act. The central inquiry where rights of action may be implied remains whether Congress intended to create a private right of action. The Court in *Cort v. Ash*, 422 U.S. 66 (1975), has prescribed the relevant inquiry:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute was enacted- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations and internal quotation marks omitted).

Nowhere in the text of § 251 or § 252, or in their legislative history is there an indication that Congress intended to create a private right of action for violations of their provisions, let alone one that permitted federal review of state commission orders interpreting or enforcing agreements. First, the 1996 Act was enacted for the benefit of consumers and not telephone service providers. Congress described the purpose of the Act as follows: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (purpose statement). Nonetheless, Congress sought to accomplish this purpose in the 1996 Act by regulating the conduct of those providers. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander,* 532 U.S. at __, 121 S. Ct. at 1521 *(quoting California v. Sierra Club*, 451 U.S. 287, 294 (1981)). The 1996 Act regulates telecommunications carriers, with emphasis on LECs and particular emphasis on incumbent LECs such as Verizon, with the goal of further opening local telephone markets to competition, for the ulti-

mate benefit of local telephone users. *See* § 251(b) (establishing obligations on LECs); *id.* § 251(c) (establishing additional obligations on incumbent LECs). Thus, the 1996 Act, in particular the statutes at issue here, was enacted for the benefit of consumers, not for the benefit of LECs, especially incumbent LECs such as Verizon.

Second, as explained above, nowhere in the text of the 1996 Act does Congress create a private right of action for the claims alleged here. In addition, the legislative history reveals that Congress considered, but decided against, creating private rights of action for violations of 47 U.S.C. § 251. S. Rep. No. 652, 104th Cong., 1st Sess. 46-47, 104-05 (1995) (discussing § 224 of the Senate bill adding proposed § 257 to 47 U.S.C.). Proposed § 257 created private rights of action for violations of § 251 (which in that bill also included much of what now is 47 U.S.C. § 252), including an action based on the failure of a carrier to comply with the terms of an approved agreement, that would have been enforceable by carriers in the federal district courts. Proposed § 257(c) made those rights enforceable by injured persons through civil actions in federal districts courts. Before the 1996 Act was enacted, however, Congress deleted proposed § 257 and added § 252(e)(6) instead. Congress' action in deleting proposed § 257 and adding § 252(e)(6) is compelling evidence that Congress did not intend to create private rights of action in the 1996 Act.

The Court has indicated that where the first two factors are resolved in the negative, it is unnecessary to consider the remaining factors and the inquiry is at an end. *Touche Ross & Co. v. Redington*, 442 U.S. 577, 575-76 (1979); *id.* at 579-80 (Brennan, J., concurring). Thus, the Court need go no further in this case. Because Congress created no private right of action in favor of carriers either to enforce the obligations

in § 251 against each other in federal court or for federal review of state commission decisions interpreting or enforcing agreements, the issue of whether 28 U.S.C. §1331 provides for jurisdiction to enforce that non-existent right is a moot point.

Notwithstanding, Petitioner Verizon advances two arguments in support of its contention that jurisdiction exists under § 1331, neither of which has merit. (Neither Petitioners MCI nor the United States joins Verizon in making these arguments.). First, Verizon contends that it has a federal statutory right to enter into a "binding" agreement under § 252(a)(1).[1] Verizon Br. at 17. On the contrary, the 1996 Act imposes a duty on Verizon to negotiate and enter into agreements upon request. § 251(c)(1); § 252(f)(5) (duty to negotiate an agreement not affected by submitting statement of generally available terms). Although § 252(a)(1) allows an incumbent LEC to enter into an agreement without regard to the substantive standards in §§ 251(b) and (c), it does not alter the fact that a duty nonetheless exists to enter into an agreement, nor does it somehow transform that duty into a right. An agreement entered into with regard to the Act or one whose terms are imposed in arbitration is no less binding on the parties than an agreement entered into without regard to the 1996 Act. Verizon may not shirk its duty merely by claiming the duty is a right. Unlike a right, Verizon may not unilaterally waive or relinquish its obligations under the

[1] It is odd that Verizon claims a violation of § 252(a)(1) when it consistently has maintained that the disputed reciprocal compensation provisions at issue in this case were negotiated *with regard* to the Act. *See* Verizon Br. at 19 (contending that that the reciprocal compensation provisions in its agreement reflect an "express incorporation of the federal statutory standard.").

1996 Act. Moreover, as explained above, Verizon is not in the class for whose special benefit the statute was enacted. The 1996 Act was enacted to benefit telephone customers, not Verizon. Accordingly, Verizon has no federal statutory right under 252(a)(1) and its contention is without merit.[2]

The gravamen of Verizon's second contention is that the agreements are federal contracts, and any claim based on those contracts arises under federal law. Verizon Br. at 20-25. Although the 1996 Act imposes a duty on incumbent LECs to enter into agreements upon request, it does not impose specific obligations that contracting parties can enforce against each other independent of the terms and conditions of the agreement. Congress intended to encourage private negotiation of agreements and established minimum standards incumbent LECs must agree to provide if sought by a requesting carrier. But the actual details are left to the contracting parties. Section 252(a)(1) specifically allows carriers to enter into agreements without regard to the substantive standards in §§ 251(b) and (c). If Congress had in-

[2] Verizon further contends (and assumes a federal right of action) that the construction of federal statutory language incorporated into an agreement presents a federal question. Verizon Br. at 19-20. The Court rejected a similar argument in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986), holding that merely because a tribunal must interpret federal law or federal regulations to determine the merits of a state cause of action is insufficient to confer federal question jurisdiction. Here of course, Congress intended for violations of agreements to be brought under state law. There is no private right of action for violation of § 251 or § 252 other than a right stemming from the agreement. Verizon sought a declaratory ruling from the MPSC regarding its agreement, the MPSC interpreted the agreement, and review of that decision must be had in the state courts of Maryland.

tended to impose and enforce federal standards, it could have simply mandated detailed federal standards, rather than allowed the parties to negotiate privately terms and conditions in particular agreements with or without regard to those standards.

Even the mandatory incorporation of federal standards into a contract (which, of course is not the case here) does not, in and of itself, create federal jurisdiction in a contract action based on an alleged violation of those standards. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *Jackson Transit Auth.v. Local Div.* 1285, *Amalgamated Transit Union*, 457 U.S. 15, 29 (1982). The touchstone is congressional intent and, here, Congress intended that the agreements be governed by state law. Indeed, as implemented, the agreements themselves specifically provide that they are governed by state law, and disputes about the meaning of their terms and conditions arise under state law. As the Fourth Circuit explained:

> It is a question of State law, however, whether the interconnection agreement at issue in this case includes a dynamic incorporation of statutory interpretation, including the definition of which calls constitute local calls subject to reciprocal compensation.....The State commission construed the agreement at issue in this case in accordance with its conclusions about the parties' intent on the issue of how to classify ISP-bound calls.

Pet. App. 27a.

There is absolutely no support in the text and structure of the 1996 Act for the notion that Congress intended to carve out

and "federalize" a special category of state contract law involving telecommunications.[3]

Verizon's argument relies on the undefended premise that agreements are not truly voluntarily negotiated, but reflect merely federal regulatory obligations. In Verizon's view, interconnection agreements will almost always mirror the requirements of the 1996 Act because incumbent LECs will give no more than the Act requires, and competing LECs will accept no less. Verizon Br. at 3-5. This idea, however, ignores the real world cost-benefit analysis employed in contracting. Contracting parties commonly forego those items or terms to which they believe they may be entitled or may be able to obtain in negotiation in exchange for other items or terms they perceive to be more valuable. These exchanges and concessions are the essence of negotiation, and are permissible under the Act. It is certainly conceivable that, among other things, the carriers weighed the expected costs to secure an item (here, the costs of compulsory arbitration and possible further litigation in the courts) and the probability of actually receiving a favorable decision against the expected value of the item. Clearly, the benefit of obtaining a particular item to which one is entitled (or retaining

[3] Moreover, agreements contain many provisions, *e.g.*, dispute resolution, indemnification, limitation of liability, that are not federal obligations. Further, § 252(e)(3) expressly allows state commissions to "establish[ ] or enforce[ ] *other* requirements of State law" in their review of agreements submitted for approval under § 252(e)(1). 47 U.S.C. § 252 (e)(3) (emphasis added). Hence, that section presumes agreements would be governed by state law even before state commissions begin their review. As a consequence, Verizon's argument that *any* claim based on an agreement arises under federal law most surely is incorrect.

an item one is not required to give up) may be substantially outweighed by the costs of actually securing it (or retaining it).

In addition, incentives likely exist for both competing LECs and incumbent LECs to voluntarily enter agreements that do not necessarily "mirror" the requirements of the 1996 Act. For example, competing LECs may have an incentive to take less than what they are entitled to not only to lower costs, but also to gain the ability to enter the local market more quickly and begin providing service in competition with the incumbent. Indeed, in Illinois, shortly after passage of the 1996 Act, three of the carriers who are parties in *Mathias,* Teleport Communications Group, Inc., Focal Communications Corp. and MFS Intelenet of Illinois (predecessor to MCI WorldCom) executed privately negotiated agreements with Ameritech Illinois and promptly began providing service under them.

To be sure, incumbent LECs may be motivated to protect their monopolies, but Congress recognized this and provided the statutory framework to redress the disparity in bargaining strength. Besides the prospect of compulsory arbitration, Congress provided an additional, more powerful incentive for incumbent LECs to cooperate and open their markets to competition: entry into the in-region long distance market. Verizon, as an incumbent LEC, may have a strong incentive to give more than the minimum requirements of the 1996 Act in order to persuade regulators that it has opened its local market to competition and, therefore, win approval to enter the long-distance market under § 271 of the 1996 Act. Verizon, along with the other Regional Bell Operating Companies, have been clamoring to gain entry to the lucrative long distance market, and it is this "carrot- and-stick" approach to opening telecommunications markets that the 1996 Act

adopts. 47 U.S.C. § 153(4); *see BellSouth Corp. v. FCC*, 144 F.3d 58, 60-61 (D.C. Cir. 1998); *SBC Communications Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998).

Verizon also equates agreements with federal tariffs, going so far as to assert that "1996 Act interconnection agreements function in all material respects as federal tariffs." Verizon Br. at 26. Significantly, however, Verizon does not assert that the services in agreements are *actually* set forth in federal tariffs filed with the FCC. They are not. The agreements are for the provision of local telephone service. The rates, terms and conditions of local services incumbent LECs offer, including those required by § 251, are, to the extent required, set forth in state tariffs filed with state commissions, not in federal tariffs filed with the FCC. *See* 47 U.S.C. § 203 (requiring tariffs filed with the FCC for *interstate* services); *id.* § 152(b) (preserving state authority over intrastate services). In Illinois, for example, the interconnection, unbundled network element and resale service obligations of § 251 that incumbent Ameritech Illinois provides in its interconnection agreements are also set forth in state tariffs filed and administered by the Illinois Commerce Commission ("ICC"). Illinois Bell Telephone Company Tariff No. 20, Part 19 (setting forth the terms and conditions for unbundled network elements) (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html?pid=260); *see, e.g.*, Michigan Bell Telephone Co., Tariff No. 20, Part 19 (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html?pid=282); *see generally* SBC tariffs (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html).

Other provisions of the 1996 Act demonstrate that interconnection agreements are not federal tariffs. Section 252(h) requires that approved agreements be filed with state commissions, not the FCC. Furthermore, § 252(f)(1) permits Bell operating companies such as Verizon to file statements of generally available terms ("SGAT") setting forth the terms and conditions offered to comply with its obligations under § 251. Under § 252(f), those SGATs are also filed with state commissions, not the FCC. *See, e.g.*, Bell Atlantic SGAT filed in Maryland (available at http://www.bellatlantic.com/tariffs_info/intra/efftar/md/sgat/index.htm). To be sure, suits to enforce tariffs filed with the FCC have been held to arise under federal law. *E.g.*, *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998). By parity of reasoning, suits to enforce agreements, which are filed with state commissions, and whose services are also set forth in state tariffs, arise under state law.

Petitioner MCI's reliance on *Jackson Transit* in support of its contention that the district court had jurisdiction under § 1331 to hear Verizon's complaint against the Maryland Public Service Commission ("MPSC") is misplaced. MCI Br. at 21-22. Under § 13(c) of the Urban Mass Transportation Act of 1964, state and local governments were required to make arrangements to preserve transit workers' existing collective bargaining rights as a condition for receipt of federal funds before acquiring a privately-owned transit company. *Jackson Transit*, 457 U.S. at 16. Jackson Transit Authority entered into a § 13(c) agreement guaranteeing the existence of its workers' bargaining rights and a collective bargaining contract with the union. *Id.* at 18-19. Unlike in *Jackson Transit*, where the existence of a federal right was not disputed, Verizon claims a federal right where none exists. Section 251 imposes obligations on Verizon; it does not be-

stow rights, and certainly none that can be enforced against state commissions that apply here. Cf. § 252(e)(6) (providing for judicial review of state commission determinations made in the approval process). Furthermore, the local government entity in *Jackson Transit* was a party to the § 13(c) contract. 457 U.S. at 19. Here, of course, the MPSC is not a party to the agreement; instead, it was the state adjudicator of the parties' dispute over the meaning of the agreement. The 1996 Act does not give Verizon, or LECs (incumbents and new entrants) in general, a federal right to a particular outcome in disputes between themselves over agreements that is enforceable against state commissions in federal court.

II. FEDERAL DISTRICT COURTS LACK JURISDICTION UNDER 28 U.S.C. § 1331 TO REVIEW STATE COMMISSION ORDERS INTERPRETING OR ENFORCING INTERCONNECTION AGREEMENTS.

Even if the Court were to accept Petitioners' view of the 1996 Act and find a private right of action, the most weight that construction could bear is that the parties to an agreement could bring an action against each other in federal court, not against state commissions for review of their orders. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. Subject matter jurisdiction under § 1331 does not exist because Verizon's appeal of the MPSC's order 1) is not within a federal district court's "original jurisdiction," and 2) is not a "civil action" as required by § 1331. The review Verizon seeks here is a continuation of the administrative proceedings before the MPSC. As a result, it does not come within § 1331.

A. Verizon's Appeal Is Not Within a Federal District Court's Original Jurisdiction.

A federal issue raised, litigated and decided before a state administrative agency (or for that matter a state court) does not qualify as a federal question within a district court's *original jurisdiction* under § 1331 merely by restating that federal issue in a complaint filed in federal court. Verizon raised and fully litigated at the MPSC the allegations contained in its complaint. In turn, the MPSC considered and rejected Verizon's arguments on the merits. Verizon does not argue that it has alleged in its complaint a federal or constitutional claim different from those federal issues it raised at the MPSC. It merely seeks appellate review of state and federal issues decided by the MPSC and correction of the MPSC's order.

The nub of Petitioners' argument is that, since Verizon has alleged claims "arising under the Constitution, laws or treaties of the United States," it has met the requirements of §1331. Verizon Br. at 11, 16, United States Br. at 17-18; MCI Br. at 16-18. Their undefended premise is that the mere allegation of a federal question without regard to whether that federal question was previously litigated in and decided by a state agency establishes jurisdiction under § 1331. This premise is erroneous. Verizon impermissibly seeks to bootstrap federal defenses raised, fully litigated, and rejected at the MPSC into federal questions within a district court's "original" jurisdiction. However, because it fails to allege a federal question *separate and distinct* from the federal defenses raised and decided at the MPSC, it fails to satisfy the requirements of § 1331. Petitioners ignore the fundamental legal principle that "[f]ederal courts have no general appellate authority over state courts or state agencies." *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985).

More particularly, federal district courts, as courts of original jurisdiction, do not have appellate power, and are without jurisdiction to review on appeal action taken administratively or judicially in a state proceeding. *See Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 354-55 (1961); *Chicago, R.I. & P. Co. v. Stude*, 346 U.S. 574, 581 (1954). Cross-system appellate authority is entrusted solely to this Court, not to the lower federal courts.

In its complaint, Verizon seeks just that: appellate review of the MPSC's order in federal district court. In Count I, Verizon alleges that the MPSC violated federal law by misapplying relevant FCC decisions in interpreting language in Verizon's interconnection agreements. Complt. ¶¶ 5, 39-40. Count II alleges the MPSC violated federal law by misreading the FCC's ruling to require the MPSC to impose reciprocal compensation for ISP-bound calls. *Id.* ¶¶ 6, 41-42. The claims Verizon considers to be federal claims were raised, fully litigated, and rejected by the MPSC. Verizon merely seeks review and correction of the MPSC's order. As a result, its claims are bound by the administrative record before the MPSC. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 167-68 (1997) (finding property owners' federal claims not originally brought before the state administrative agency were not bound by the administrative record).

Petitioners, however, contend that *International College of Surgeons* supports jurisdiction to review the MPSC's order. Verizon Br. at 35-38; MCI Br. at 26; United States Br. at 25. However, the critical difference between *International College of Surgeons* and this case is that in the former case, plaintiffs raised their federal claims for the first time in court after the administrative proceedings at the agency had concluded. Respondents International College of Surgeons and

a related organization (collectively "ICS") applied for permits to demolish two buildings on properties it owns in Chicago, which had been designated by city ordinance as historic landmarks. 522 U.S. at 159-60. The Commission on Chicago Historical and Architectural Landmarks ("Landmarks Commission"), to which the application was forwarded, denied those permit requests. *Id.* at 160. ICS then filed a complaint in the Circuit Court for Cook County seeking judicial review of the Landmark Commission's administrative decision to deny the permits. It also raised for the first time in its complaint several federal constitutional challenges. *International College of Surgeons v. City of Chicago*, Nos. 91 C 1587, 91 C 5564 (cons.), 1992 WL 6729, at *2-3 (N.D. Ill. Jan. 10, 1992).

Following the denial of its permit request, ICS filed an application seeking an economic hardship exception to the Landmark Commission's denial of the demolition permits. *Id.* at *2. The Landmark Commission denied ICS' application. ICS then filed a second complaint in the Court for Cook County seeking judicial review of the Landmark Commission's administrative decision to deny the economic exception. *Id.* at *3. It also raised for the first time in its complaint facial and as-applied federal constitutional challenges to Chicago's Landmarks Ordinance. *Id.* Consequently, the district court's original jurisdiction derived from ICS' federal claims, filed for the first time in the circuit court, which were not decided by the Landmarks Commission and, therefore, were not part of the administrative record.

Whether a federal question is within a district court's original jurisdiction turns not on whether evidence outside the administrative record may be considered, but rather on which issues and claims themselves are part of the adminis-

trative record. In this case, all of Verizon's federal claims are part of the administrative record and it alleges no federal question independent of the federal issues decided in the administrative record that would establish federal question jurisdiction under § 1331. Thus, because Verizon's complaint asks this Court to reconsider federal issues already litigated and decided at the MPSC it does not come within the Court's original jurisdiction. *See International College of Surgeons*, 522 U.S. at 167-68.

The cases Petitioners rely on purportedly to establish federal jurisdiction serve only to highlight the differences between this case and federal question cases properly within a district court's "original jurisdiction" under § 1331. For example, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), several airline companies brought suit in federal district court for a declaratory judgment alleging that New York's Human Rights Law was preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 92-93. Similarly, in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), Lawrence County initially brought suit in federal district court for a declaratory judgment that a South Dakota statute conflicted with a federal statute. *Id.* at 259 & n.6. In both cases the federal questions were first brought in the district court and thus were not previously decided by a state court or administrative agency. As a result, the federal claims were properly within the district court's original jurisdiction under § 1331.[4]

[4] Of course, that the suits were merely filed in district court does not determine whether the suit is within the court's original jurisdiction. The suits could have been filed in a state trial court and removed by defendants pursuant to 28 U.S.C. § 1441. The controlling factor is whether the federal questions were previously decided by a state court or administrative agency. If the federal questions were already decided by a state court or agency then the suits are not within the district court's original jurisdiction under § 1331.

In contrast, the claims Verizon asserts to be federal questions were previously litigated and decided at the MPSC. As a consequence, they are not within the district court's "original jurisdiction." Indeed, if the district court were to consider the questions, as Verizon requests, it would necessarily involve the court in reconsidering the MPSC's decisions on the federal issues and, accordingly, require it to conduct an appellate review. However, it is precisely this "appellate" jurisdiction which § 1331 expressly precludes.

A more analogous scenario illustrates the point. If, for example, the airlines in *Shaw* and the county in *Lawrence County* had chosen to file their federal preemption suits initially in state court, litigated the suits in state court and lost, they could not thereafter seek review in federal district court on those same claims under § 1331. The reason is simple: the district court would lack original jurisdiction. The court would be performing an appellate review of the state court's decision, and it is precisely this "appellate" jurisdiction which § 1331 expressly precludes. Further review of the state court's decision on the federal preemption claims would lie only in the state appellate system, with federal review possible only in the U.S. Supreme Court. *Lynx v. La-Porte Superior Court No. 2*, 789 F.2d 554, 563 (7th Cir. 1986). In this case, the MPSC, like the state trial court in the above example, decided all of the issues Verizon alleges in its complaint. The sole means for obtaining review of the MPSC's decision is prescribed by Maryland law, Md. Code

Ann., Pub. Util. Co., § 3-203 (2001), which fixes administrative review exclusively in Maryland state court.[5]

The events in *Mathias* are particularly instructive. After the ICC issued its decision, Ameritech Illinois filed a Petition for Review of the ICC's order in the Illinois Appellate Court. It also filed a complaint for review of the ICC's order in federal district court. It is inconceivable how Ameritech Illinois' appeal can simultaneously constitute an appeal in state appellate court under the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.*, and an action within a federal district court's original jurisdiction under 28 U.S.C. § 1331. Unlike the situation in *International College of Surgeons*, where ICS filed a complaint in circuit court alleging, for the first time, federal claims and seeking judicial review of the Landmark Commission's decisions, Ameritech Illinois filed a petition for review of the ICC's order in state appellate court seeking review of federal and state law questions decided by the ICC, not a complaint in circuit court alleging federal claims different from those issues it raised and litigated before the ICC.

B. Review of the MPSC's Order Is Not A "Civil Action" Under 28 U.S.C. § 1331.

Verizon's action seeking appellate review of the MPSC's order is not a "civil action" within the meaning of § 1331. The Seventh Circuit in *International College of Surgeons v.*

[5] Moreover, that Verizon requests declaratory relief is immaterial. *See Mackay v. Pfeil*, 827 F.2d 540, 545 (9th Cir. 1987) (holding that a request for declaratory relief that does not state a new case arising upon new facts, but in reality seeks review and correction of a state court judgment, is not within a federal court's original jurisdiction).

City of Chicago, 91 F.3d 981 (7th Cir. 1996), *rev'd on other grounds*, 522 U.S. 156 (1997) explained, in the context of a removal action, the test for determining whether an action seeking judicial review of a state administrative agency's decision is a civil action within a district court's original jurisdiction. If the state administrative review process provides for a trial *de novo*, the action does not require the district court to perform an appellate function that is inconsistent with the character of a court of original jurisdiction, and the state proceeding can be termed a "civil action." *Id.* at 990. If, however, the state administrative process requires the state court to proceed on the basis of a more deferential review of the state agency's findings and determinations, the action would require the district court to perform an appellate role with respect to the decision of the state administrative agency. In that case, "[t]he district court would not be performing a function that could be described as a 'civil action' within its original jurisdiction." *Id.* & n.10 (collecting cases). Thus, in analyzing whether an action is a "civil action" within the meaning of § 1331, the relevant inquiry is how the Maryland courts review the MPSC's decisions.

In reviewing the decisions of the MPSC, Maryland courts exercise a statutory jurisdiction. Md. Code Ann., Pub. Util. Co., § 3-203 (2001). Like the Illinois Administrative Review Act ("IARA") at issue in *International College of Surgeons*, § 3-203 of the Maryland Statute restricts the exercise of a reviewing court's power to those functions expressly delegated in the statute. This special statutory jurisdiction provides for a deferential review of the MPSC's findings and determinations. The appeal is to be heard on the record be-

fore the MPSC,[6] the MPSC's findings and conclusions on factual questions shall not be disturbed unless found to be unlawful or unreasonable by clear and satisfactory evidence, and the MPSC's decisions and orders shall be held to be *prima facie* correct. *Id.* § 3-203; *Office of Peoples Counsel v. Maryland Public Service Comm'n*, 733 A.2d 996, 1002-03 (Md. 1999). In short, the scope of review under § 3-203 is similar to that of the IARA in all respects that the Seventh Circuit in *International College of Surgeons* relied on in reaching its decision.[7]

Applying the test it articulated to the IARA, the Seventh Circuit in *International College of Surgeons* found that

[6] Although a party may introduce new evidence on judicial review in the circuit court, that evidence, if materially different, is first referred to the MPSC for opportunity to modify its findings. § 3-208; § 3-206(b). If, on referral, the MPSC rescinds its order, the circuit court shall dismiss the appeal and any modification made by the Commission shall stand in place of the original action. *Id.* § 3-208(c)(1). If, on referral, the MPSC does not rescind or modify the original action, the circuit court shall render judgment on the original order. *Id.* § 3-208(c)(2).

[7] In Illinois, review of ICC decisions starts in the Illinois Appellate Court. In reviewing decisions of the ICC, Illinois appellate courts exercise a statutory jurisdiction, and not a general appellate jurisdiction. This special statutory jurisdiction is found in 220 ILCS § 5/10-201. Like the IARA, § 5/10-201 also restricts the exercise of a reviewing court's power to those functions expressly delegated in the statute. For example, the appeal shall be heard on the record before the ICC and no new or additional evidence may be introduced, the ICC's findings and conclusions on questions of fact shall be held prima facie to be true, and the ICC's decisions and orders shall be held to be *prima facie* reasonable. 220 ILCS § 5/10-201(d).

"[j]udicial scrutiny with this level of deference to the decision of the administrative agency certainly cannot be characterized as within the original jurisdiction of the court....It is an appellate proceeding and, as such, it is not a 'civil action'...of which the district courts...have original jurisdiction." *International College of Surgeons*, 91 F.3d at 992. As in *International College of Surgeons*, Verizon's action is an appellate proceeding and, thus, not a "civil action" within the meaning of § 1331. *See Trapp v Goetz,* 373 F.2d 380, 383 (10th Cir. 1966) ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C. § 1331 or § 1332.").

Petitioner Verizon implies that this Court rejected the Seventh Circuit's test for determining whether a suit is a "civil action" within a district court's original jurisdiction in its consideration of the *International College of Surgeons* case. *See* Verizon Br. at 36-37. In fact, the Court did not disturb the Seventh Circuit's test for determining whether a suit constitutes a "civil action" within a district court's original jurisdiction. Instead, it merely rejected the manner in which the Seventh Circuit applied the test to the particular circumstances before it. The Seventh Circuit held that even though the federal claims were removable, the entire suit was not a removable "civil action" because it contained state administrative claims for deferential on-the-record-review which were not "civil actions" of which the district court's have "original jurisdiction." *International College of Surgeons*, 91 F.3d at 993-94. The Seventh Circuit's error, this Court explained, was not in applying the test for a "civil action" to the federal claims, but rather in applying the test to the state administrative claims after it had already determined that the federal claims were civil actions within the

district court's original jurisdiction. *International College of Surgeons,* 522 U.S. at 166-67. The Court remarked:

> Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that ICS's federal claims were "civil actions" within the federal courts' "original jurisdiction."
>
> Having thus established federal jurisdiction, the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's supplemental jurisdiction, not its original jurisdiction.

Id. at 166-67. Supplemental jurisdiction lies over related "other claims" if and only if there already exists a "civil action of which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). That is, the exercise of supplemental jurisdiction presupposes a "civil action."

As distinguished from *International College of Surgeons*, in the instant case there is no federal claim independent of the administrative record that constitutes a "civil action" for purposes of § 1331. In other words, no independent federal claim predicate exists for supplemental jurisdiction to attach. Verizon's complaint contains two pendent claims in search of a federal question claim within the meaning of § 1331. In *International College of Surgeons*, ICS' constitutional claims were found to be "civil actions" because they were raised for the first time in the complaint in the circuit court and were not raised and decided at the Landmarks Commission. Since all of the claims in Verizon's complaint were raised, fully litigated, and decided at the MPSC its claims are bound by the administrative record. *International College of Surgeons*,

522 U.S. at 167. As a consequence, Verizon's action is one for appellate review of the MPSC's order and, therefore, is not a "civil action" within the meaning of § 1331.

In sum, because Verizon's action is one for appellate review of an MPSC order its appeal is not within the Court's "original jurisdiction" and is not a "civil action" as required by § 1331. Likewise, because Verizon's appeal arises under Maryland law, it does not "arise under" federal law for purposes of § 1331. If, as Verizon asserts, it finds fault with the MPSC's order, its proper course of action is to seek judicial review in Maryland courts. Verizon may not, as it does here, engage in an impermissible collateral attack of the MPSC's order in federal court. Accordingly, 28 U.S.C. § 1331 provides no basis for jurisdiction over Verizon's appeal.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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